

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

AMEREN TRANSMISSION COMPANY OF)	
ILLINOIS)	
)	Docket No. 14-0291
Petition for an Order Pursuant to Section 8-509 of)	
the Public Utilities Act Authorizing Use of Eminent)	
Domain Power.)	

**REPLY IN SUPPORT OF
AMEREN TRANSMISSION COMPANY OF ILLINOIS’
MOTION TO STRIKE AFFIDAVIT OF ATTORNEY GEORGE J. LEWIS**

I. INTRODUCTION

Intervenors’ response to ATXI’s motion to strike the testimony of their counsel in this proceeding highlights the problem with allowing their attorney to also serve as their witness: it is unclear whether his testimony should be taken as proof or as an analysis of the proof. *See* Ill. R. Prof’l Conduct 3.7, Comm. Cmt. 2. Intervenors appear to argue the testimony is both. But they cannot have it both ways; they must decide whether Mr. Lewis is their counsel or their expert witness. Rather than disqualify him as their counsel, however, the Commission simply should strike Mr. Lewis’s affidavit from the record or bar its admission into evidence. That will resolve the problems it creates.

II. ARGUMENT

A. Intervenors do not dispute that the Lewis Affidavit is subject to the advocate-witness rule.

Intervenors’ response does not address the Illinois rule prohibiting an attorney from also serving as his client’s witness, let alone explain why the Lewis Affidavit should be excepted. Ill. R. Prof’l Conduct 3.7 (2010). Instead, Intervenors concede that they engaged Mr. Lewis for his legal services and that his Affidavit testifies to issues contested in this proceeding. (Resp. 1-2); *see* Ill. R. Prof’l Conduct 3.7(a)(1).

Intervenors then contend that, because he was their contact with ATXI, Mr. Lewis “is the only person who has first-hand knowledge of Ameren’s conduct concerning negotiations or lack thereof” related to the purchase of easement rights in their property. (Resp. 1.) The Lewis Affidavit, however, goes well beyond simply recounting Mr. Lewis’s contacts with ATXI. It discusses apparent appraisal and negotiation standards, and opines that ATXI allegedly did not meet those standards. (*Id.*)

Intervenors do not dispute that they could have retained an expert witness who was not their attorney to offer those opinions; in fact, the Lewis Affidavit suggests that they intended to do so. (Lewis Affid. ¶ 4.) But they did not. If this has deprived of them of any “evidence” in support of their positions (*see* Resp. 1), it is the consequence of their strategy. It is not, however, one of the limited exceptions to the advocate-witness rule. Ill. R. Prof’l Conduct 3.7(a)(1)-(3).

B. Intervenors concede that the Lewis Affidavit offers expert opinions; so, they must choose whether Mr. Lewis is their counsel or their expert.

Intervenors admit that the Lewis Affidavit offers purportedly expert opinion testimony. (Resp. 2 (claiming Mr. Lewis “does qualify as an expert as to the opinion evidence as set forth in his Affidavit.”).) Yet they do not explain why this is appropriate or, specifically, what Mr. Lewis’s expertise is. Rather, their response describes Mr. Lewis’s experience—both legal professional and personal—related to property sales and the like. (*Id.* 2-3.) It therefore remains unclear whether the opinions in the Lewis Affidavit are legal opinions or real estate ones. (*See* ATXI Mtn. Strike 5.)

But it does not matter. If they are the former, they must be stricken; conclusory legal expert opinions are *per se* impermissible. *See, e.g., N. Moraine Wastewater Reclam. Dist. v. Ill. Comm. Comm’n*, 392 Ill. App. 3d 542, 573 (2d Dist. 2009); (ATXI Mtn. Strike 4 (citing cases)). The appropriate place for them is in legal brief. If they are the latter, as explained, Rule 3.7

requires that Mr. Lewis withdraw as Intervenor's counsel in this proceeding. *See* Ill. R. Prof'l Conduct 3.7(a). He can then proceed as their expert witness.

C. Intervenor's ignore the problems and prejudice that the Lewis Affidavit's purported expert opinions creates.

Due process in administrative proceedings guarantees the right to cross-examine adverse witnesses. *Gigger v. Bd. of Fire & Police Comm'rs of City of East St. Louis*, 23 Ill. App. 2d 433, 439 (4th Dist. 1959). The Comments to Rule 3.7 explain that "[t]he opposing party has proper objection where the combination of [of the advocate and witness] roles may prejudice that party's rights in the litigation." Ill. R. Prof'l Conduct 3.7, Comm. Cmt. 2. In arguing that their counsel also is their expert witness, Intervenor's ignore the problems the Lewis Affidavit creates.

Problems likely will arise when ATXI crosses Mr. Lewis at hearing, as is its legal right if he is permitted to testify as Intervenor's expert witness. For example, while ATXI may inquire into the bases for an expert witness's opinions, the rule protecting attorney-client communications from disclosure may bar ATXI from fully exploring the bases for Mr. Lewis's opinions here. *See* Ill. Sup. Ct. R. 201(b)(2). ATXI also questions what legal counsel will defend Mr. Lewis on behalf of Intervenor's when he takes the stand. These and other unforeseen difficulties resulting from Mr. Lewis's apparent dual role in this proceeding demand that his affidavit be stricken. *Cf.* ABA Model Code of Prof'l Resp., EC 5-9 ("If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case.") (quoted in *Jones v. Chicago*, 610 F. Supp. 350, 356 (N.D. Ill. 1984)).

III. CONCLUSION

Either Mr. Lewis is Intervenors' counsel or he is their expert witness. He cannot be both. Consistent with that law, the Commission should strike the Lewis Affidavit and thereby preserve the integrity of the record of this proceeding.

Dated: May 1, 2014

Respectfully submitted,

AMEREN TRANSMISSION COMPANY OF
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By: /s/ Albert D. Sturtevant
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CERTIFICATE OF SERVICE

I, Albert D. Sturtevant, an attorney, certify that on May 1, 2014, I caused a copy of the foregoing *Reply in Support of Ameren Transmission Company of Illinois' Motion to Strike the Affidavit of Attorney George Lewis* to be served by electronic mail to the individuals on the Commission's Service List for Docket 14-0291.

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